UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 13 CR 315 (WHP)

FREDERIC CILINS,

Defendant.

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New York, N.Y.
September 12, 2013
5:20 p.m.

Before:

HON. WILLIAM H. PAULEY III,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ELISHA KOBRE
STEPHEN SPIEGELHALTER
Assistant United States Attorneys

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BRUCE LEHR

LAW OFFICE OF MICHELLE SMITH
Attorneys for Defendant
BY: MICHELLE SMITH

ALSO PRESENT: JOSE VOIGT, French interpreter
CHRISTOPHER MARTINEZ, FBI

(In open court)

(Case called)

THE DEPUTY CLERK: Appearances for the government.

MR. KOBRE: Good afternoon, Elisha Kobre for the government. With me at counsel table is Stephen Spiegelhalter of the fraud section of the Department of Justice and Chris Martinez for the FBI.

THE COURT: Good afternoon, Mr. Kobre.

MR. SCHWARTZ: Good afternoon, your Honor. William Schwartz of Cooley LLP. I am the new guy on this block.

THE COURT: All right. Good afternoon, Mr. Schwartz.

MR. SCHWARTZ: Good afternoon.

MR. LEHR: Bruce Lehr and Michelle Smith as well.

THE COURT: Good afternoon, Mr. Lehr and Ms. Smith.

MS. SMITH: Good afternoon.

THE COURT: I note the presence of a French interpreter. Would you please identify yourself.

THE INTERPRETER: Yes, your Honor, Jose Voigt.

THE COURT: Please administer the oath to the interpreter.

(Interpreter sworn)

THE COURT: Mr. Cilins, are you able, sir, to understand what is being said here this afternoon through the French interpreter?

THE DEFENDANT: Yes, your Honor.

THE COURT: Very well.

All right. This matter is on for argument on two motions, the government's motion in limine and the defendant's motion to compel the production of original documents.

Who wants to be heard?

MR. KOBRE: Mr. Spiegelhalter will be speaking on behalf of the government.

MR. SPIEGELHALTER: Your Honor, do you mind if I use the podium?

THE COURT: I want you to use the podium.

All right. Mr. Spiegelhalter.

MR. SPIEGELHALTER: Thank you, your Honor.

We can, of course, take this in any order the Court would like. I think the defense motion was pending first, and there has been a development with respect to the motion to compel.

THE COURT: Right.

So I would like to know what the government's position is now.

MR. SPIEGELHALTER: Yes, your Honor. The portion of the motion -- well, just as a factual background, the government of the United States has now obtained the original documents from the government of Guinea, who had possession of them previously. We have made them available for inspection by the defense, and we could do that again under proper protocols.

The defense actually did have the opportunity to inspect them today at the FBI's offices.

From the government's perspective, the motion to compel itself is moot, the motion to compel production or the opportunity to inspect the documents in the first instance.

There was, however, a second part of that motion which was a request by the defense to conduct forensic testing of the contracts. This is sort of bound up in the second motion, the government's motion in limine.

The government's position has not changed which is, that that would be inappropriate in the context of this case. I think that part of the defense motion remains alive and is bound up in the government's motion in limine.

With respect to the government's motion in limine, your Honor, I don't want to parrot the briefs back to the Court. I am sure the Court is very familiar with them.

The government's motion is to preclude the defendant from introduction at trial any argument or evidence that the contracts in question were false, fraudulent, or forgeries and that the defendant was therefore justified in attempting to destroy them.

The secondary argument is -- frankly, the government believes it could be resolved on that first argument.

The secondary argument is, even if the defendant is allowed to testify or put in evidence that he subjectively

believed that the documents were forged, that nothing that could be done by an expert at this point would be relevant in this case because it would have no bearing on his belief at the time.

THE COURT: At trial does the government anticipate that its cooperating witness will say that she did sign the contract?

MR. SPIEGELHALTER: The government hasn't made any decision about what questions it would ask the cooperating witness.

I can tell the Court that the government's overall goal is to streamline the trial as much as possible, and in the government's view a sideshow about the contracts themselves is dangerous from the perspective of the entire thing, so it would become much longer.

The government does not intend, if the Court rules in the government's favor on this motion, to make any issue of the contracts whatsoever. So the government obviously won't bring anybody to testify that the contracts were real.

The government would not focus on the first part of the attestation. There were three in the false, the creation of a false document count, 1519.

The first part of that attestation is that the cooperating witness said she had never signed any contracts with the defendant. The government will not proceed on that

portion of the attestation.

The other two portions are clearly false in the government's view, and so the government's own preference is to just streamline the trial by eliminating that issue altogether.

THE COURT: So the government will not be arguing at trial that the contracts were authentic?

MR. SPIEGELHALTER: Correct.

The government views that as irrelevant both to the defendant's motive and certainly to the soundness of the counts of obstruction.

THE COURT: All right. But that is different than the assertions that the government made in its criminal complaint in this case, correct?

MR. SPIEGELHALTER: That is true, your Honor.

But already we have moved on to the indictment, and the government doesn't view that it would tread right down the line of what was in the complaint.

The government acknowledges that there could be a risk, if the defendant were in some way restricted in a way that was asymmetrical with the way the government was restricted, the government would certainly accept the same restrictions the Court imposed on the defendant under the government's motion.

So if the defendant is not allowed to argue that the contracts are forgeries, the government won't argue that they

are real.

That from the government's perspective is the way that the trial should proceed. In the government's view, the risk is a risk of nullification, because overall the defendant's argument goes to a point that simply cannot nullify his mens rea under the statute.

The way the statute is written and the legislative history and the case law under it, which the government set out at great length in its motion and its reply, all go to the reality that the fact that a contract is forged or is inauthentic doesn't go to whether a grand jury can have it, and it certainly doesn't empower an individual to decide whether the grand jury gets it after the individual is made aware that the government has subpoenaed it.

The government won't proceed to try to prove that the object is real. It would just be irrelevant to that inquiry.

THE COURT: Doesn't Judge Pratt's decision in United States v. Johnson, the Second Circuit decision from 1992, stand for the proposition that the affirmative defense is available to a defendant whose sole purpose was to induce a witness to testify truthfully?

MR. SPIEGELHALTER: That opinion I am not as familiar with, your Honor, but that is certainly the intent of 1512(f) I believe, the affirmative defense, or 1512(b), I'm sorry, the affirmative defense.

But here the issue is not one of trying to get the witness to testify truthfully. In fact, the defendant used the word "lie." But, more importantly, that doesn't go to an effort to destroy a document; not even just withhold it so that a privilege can be sorted out or whatever it may be, but to destroy a document.

The affirmative defense doesn't appear any way to cover that sort of conduct. As the government pointed out in its brief, the affirmative defense really was about augmenting the amount of information that the grand jury had available to it, and that affirmative defense was meant to protect court officers and prosecutors and FBI agents and people like that if one looks back at the legislative history.

THE COURT: Shouldn't the defendant here, Mr. Cilins, be entitled to testify that his sole intent in engaging in the prohibited conduct was to induce the cooperating witness to testify truthfully or provide truthful documents?

MR. SPIEGELHALTER: I don't think there is a factual predicate for that.

The government would refer the Court back to all of the duress cases as to whether -- in the government's view there has to be a threshold that's been met with respect to some proffer of testimony or evidence.

Otherwise, the risk of nullification is so high, and I think that's why the duress defense is regularly ruled that it

can't be put before the jury.

But I just don't see as a factual matter how the defendant can even get within a stone's throw of that proposition based on what we know from the tapes, because the effort didn't solely hinge upon her testimony or what she would tell the FBI agents. It was about actually destroying evidence that the grand jury had sought.

So in the government's view that affirmative defense just doesn't apply. It would be very difficult to imagine a circumstance in which it would apply to that set of facts.

THE COURT: Was duress asserted in the Johnson case?

MR. SPIEGELHALTER: I actually don't recall that, your Honor. I don't recall that.

But I do know that that line of cases, in the government's conception this is really an economic duress argument that the defense is making: My confederates and I were being blackmailed by someone and we didn't want to part with our money. Therefore, I was justified in doing something that would otherwise break the law.

It doesn't get close to the threshold of being put before the jury under the normal duress test. So the government's view is that that defense, where you can't meet the set-out test and where an actual threat of harm is not put before juries on a regular basis because the district Court finds that there is insufficient evidence to do that, and I do,

again, think that the risk is nullification. Something that falls so short of that here would be especially dangerous.

What the government doesn't want to do is have a contest about who the jury likes more, the cooperating witness or the defendant or the FBI agent or whatever it may be. The government's conception is that's the risk of proceeding down this line.

THE COURT: Anything else, Mr. Spiegelhalter?

MR. SPIEGELHALTER: I don't have anything to add to the briefs unless the Court had additional questions.

THE COURT: No, not now.

Thank you.

MR. SPIEGELHALTER: Thank you.

THE COURT: Mr. Schwartz.

MR. SCHWARTZ: Yes, your Honor.

THE COURT: Or Mr. Lehr.

MR. SCHWARTZ: Your Honor, let me begin by saying what this is not about. This is not about our assertion of an affirmative defense, and it is not about an assertion of a duress defense.

I will come to that, but I want to be very clear that that's not the basis that that we think under which we are entitled to test these documents.

I will deal with the two motions together, your Honor, but I will note that our motion, which is to be able to now

test the documents that we've seen with an expert, is one that really should be decided not on the standard of relevancy, but on the standard of whether it is material to the preparation of the defense. Will it aid us if we find out that these documents are inauthentic at some point to develop a defense in this case.

The defense ties into the second motion. But your Honor doesn't necessarily have to decide that the defense is available to us today in all its terms in order to move forward and allow us to test the documents.

The principal, practical effect of deciding that we can't test the documents, your Honor, is that we will not be able to test the authenticity of documents that we believe a cooperating witness, somebody who has a cooperation agreement with the government, and who's going to testify at this trial as far as we know, has proffered to the government and stated that they were authentic. The question goes very much to her credibility, which I will come back to.

Let's deal with the issue of the defense, your Honor, and why we think that we are entitled to these and what prong of the statute or the statutes we are resting the defense on.

The crimes that have been charged here are specific intent crimes. Both crimes involving, certainly the crimes involving the destruction of documents and at least two of the three counts involving the affirmation.

I will deal first with -- I will make a general statement about the state of mind and how state of mind can be proved.

The government in its brief says we are entitled to call the defendant, we can call the defendant, and only the defendant can testify to his state of mind.

Every day in this courthouse, your Honor, and I would imagine in many trials before this Court, the government proves the defendant's state of mind sometimes beyond a reasonable doubt through the use of circumstantial evidence.

There is a charge that is often given to the juries in this courthouse that the government is entitled to rely on circumstantial evidence to prove the state of mind of a defendant.

Well, certainly, your Honor, a defendant is not required to testify and cannot be forced to testify in order to dispute his state of mind if there is in fact circumstantial evidence available that can be put before the jury and argued to the jury about his state of mind.

That's the issue with the authenticity of these documents. Are they circumstantial evidence as to the state of mind of the defendant?

If so, I think the case law in the Second Circuit is clear: You have to give us a very broad swath to prove circumstantially to defeat the government's obligation to prove

reasonable doubt on the state-of-mind elements of each of the crimes that are charged.

So we don't have to call the defendant to prove his state of mind. We don't have to prove his state of mind. We have to dispute their proof, and we are entitled to do that by circumstantial evidence.

Let's deal with the different counts.

With respect to the affirmation, your Honor, and the inducing her to sign a false affirmation, it is not just the contracts. There are several paragraphs in the attestation. The one that the government is prepared to give up is the one that says, I have never signed a single contract with blank -- because I have it blacked out in my version -- either directly or indirectly or through anyone else.

They are saying they are prepared to walk away from that. I question what the government knows that we don't yet know about what this witness is telling them about whether she signed these documents or didn't sign these documents that they are so eager and so willing to walk away from that. It kind of tests the whole case.

The second one it says, It appears that one says that I would have interceded with official leaders of Guinea in favor of -- so that blank would obtain mining rights in Guinea.

That is false.

Apparently, they are not prepared to walk away from that. These contracts, in the government's theory of the case and I believe in what the witness is going to say about the case, are proof of some kind of foreign corrupt practices, that they are the contracts to which money was going to be funneled to government officials in Guinea.

If my client felt that they were inauthentic, it is proof that he may have had a belief that there was no money sent to anybody in Guinea, and that therefore the statement that this is false in the attestation is an accurate statement. It is circumstantial evidence of that.

The circumstances under which the conversation take place, your Honor, are going to show that my client is very familiar with the things that he's asking for. The government says in its brief --

THE COURT: But how would that defeat the government's obstruction count as opposed to the false attestation counts?

MR. SCHWARTZ: Let me move on to that. There are two counts of obstruction.

There are two critical elements in the obstruction statute. One is the knowingly. You have to act knowingly.

The Supreme Court has yet to define exactly what the parameters of knowingly are, but it appears, if you read the statute, and it's common sense, knowingly probably applies to a number of different elements of the statute, including knowing

that there is a grand jury and knowing that this would impede the grand jury investigation.

The second thing that you have to do, your Honor, is you have to act with a specific intent, and the specific intent in this case is a corrupt intent.

It's the intent that the Supreme Court examined in the Arthur Andersen case, a case in which individuals at Arthur Andersen were destroying documents under a document maintenance program while at the same time knowing that there was an SEC investigation and actually making statements that there is an SEC investigation and if we don't destroy them the SEC will get them.

The trial court failed to properly charge the issue of corrupt intent. The trial court failed to tell the jury that it is something that -- I have the language here, your Honor -- that it is wrongful and immoral depraved, evil, that the defendant was conscious of wrongdoing and that what his intent was, was to actually subvert the fact finding.

Those are the elements that the government has to prove beyond a reasonable doubt, that he had an intent to subvert fact finding, that he knew what he was doing was wrong and depraved, and that he was conscious of his wrongdoing.

Those are the things they have to prove. So the question your Honor asks is how does the inauthenticity of those documents go to that element?

Well, at this stage, your Honor, of course, I'm not required to lay before the Court what our defense is, and I should not be required to do that and how we might prove it, everything in the defense.

But I can deal in hypotheticals. And I can say hypothetically, what if a defendant in my client's situation were able to show that documents in another case that were inauthentic, that he knew had been inauthentic, had been used in shakedowns prior to meetings that he was having with the witness here, and that what he did was come to the United States to try to stop, finally stop a series of extortions that had taken place. He thought there were extortions and wrongful extortions because he believed that the contracts were in fact inauthentic.

If they are inauthentic, by the way, it's pretty powerful circumstantial evidence that the belief was an accurate belief.

THE COURT: If I can interrupt for a second?

MR. SCHWARTZ: Yes.

THE COURT: How do you make the link then between Mr. Cilins' state of mind and the fact that the documents -- let's assume they are inauthentic. Without your client testifying, how do you make the link?

MR. SCHWARTZ: One way that it could be done, your Honor -- I don't want to say how we would do it, but one way it

can be done is by showing that he was familiar with the circumstances about the documents, that there is a back story here, that the back story might involve extortion and that the documents have been used before, that people that signed the documents purportedly. Some of them were in business with him.

The jury would be entitled to conclude, and the government's got tapes I believe of him talking to one of them that they have given to us.

The jury could infer that these people had told him that they hadn't signed these documents. We are allowed to argue inferences to the jury, and this is circumstantial evidence that that is true if they in fact turn out to be false.

I think that is a better argument for the state of mind we are putting forward than the state of mind they are putting forward?

How do they prove?

It is circumstantial evidence, powerful circumstantial evidence. The falsity of these documents in the context of a client who is dealing with partners who purportedly signed the documents and who is now prepared to pay to get them back, if they are in fact false, that is powerful proof that he in fact believed they were false.

If he testifies that they were false, and that's certainly an issue that we should not have to confront at this

date, by any stretch of the imagination, but we have that option, and one of the options we have is to call the witness and to have him say I believe they were false.

If they were in fact false, that's powerful corroboration of his testimony, and we should not be able to deprive him of that corroboration, certainly not two a half months before a scheduled trial date.

So it comes into evidence, I believe, to his state of mind. They may argue it's weak evidence. I happen to think it is powerful evidence that he didn't believe that they were true if they turn out to be false and there are other circumstances that link him to the people who signed the documents.

It gives him another reason to be here to get the documents back than to subvert a federal investigation.

It is up to the jury to decide. It's not up to the government to tell the Court, well, the tapes don't show a basis for that. It is up to us to get from the tapes what we think the basis is and argue it to the jury and let the jury decide.

The Court has been clear, the Supreme Court has been clear. This is an issue for the jury.

If it were not an issue for the jury they would not have reversed the Arthur Andersen case, because the facts in this case were pretty powerful. But a mischarged jury that didn't get to consider this resulted in a reversal of Arthur

Andersen, unfortunately after the demise of the company.

I hope I have answered your question, your Honor. If not, I will try a different way.

THE COURT: No. You can proceed.

MR. SCHWARTZ: So his state of mind in not believing they are true which is corroborated by or proved circumstantially by the documents is also relevant to whether he thinks this witness is lying about a grand jury.

I mean, yes, she refers to a grand jury on the tapes. She never shows him a grand jury subpoena. Although one had been issued to her she says they might give me a subpoena later on.

Well, this is a foreigner who it is apparent from the tapes has never heard the words grand jury before he's come in to have this conversation with her.

She actually makes a printout from Wikipedia and gives it to him explaining what a grand jury is. If this is a woman with a history of lying and history of producing false documents and a history of extorting people to pay money based on false documents, this is also a woman who might lie about the existence of a grand jury.

His subjective belief as to whether there was a grand jury is what the government must prove. They must prove subjectively not that she told him that there is a grand jury sitting and listening to this case or that I might get a

subpoena, but that he knew that, the knowledge requirement, that he knew that there was a grand jury and that he knew that his actions were going to impede an ongoing investigation.

That is another way that the falsity or accuracy of the documents is critical in this case.

Yet another way, your Honor, not knowing much about grand juries, not knowing that -- we don't dispute, and I don't want there to be any question. We do not dispute that the grand jury is entitled to whatever it wants.

If the grand jury wants documents that are false or they want to determine for themselves that they are false under the law, the grand jury is entitled to that.

If I am served with a subpoena, understanding the grand jury system as I do, obviously I'm going to produce documents whether I think they are false or not, if they are in fact covered by the subpoena.

THE COURT: That is what "any and all" means, right?

MR. SCHWARTZ: Yes.

The government has thrown up this red herring that we somehow think the grand jury wasn't entitle to the documents.

We are not saying that. What we are saying is that he has to know that. Then, even if he does know that, he has to act corruptly to impede their investigation knowing that he is acting wrongfully.

In a case involving a foreign person who's never heard

the words grand jury before, that is a hurdle for the government to have to leap in this case.

One of the things that we can put in the way of that hurdle, that we should be entitled to put in the way of that hurdle or make the hurdle higher for them, is proof that the documents that they were seeking were false, because now we have a foreign citizen coming into the United States whose never heard of the words "grand jury" before, who's told about grand jury from a woman who may have lied to him before and lied to his partners before, and who he thinks is going to produce phony documents to that grand jury.

How is he supposed to know he's impeding a grand jury investigation?

And if the documents turn out to be false once again it's corroboration, it is proof that he believed that there they were false.

If he doesn't testify, circumstantially he can argue about to the strength of that, and it's corroboration if he does testify. I comes in, I think, in all kinds of different ways.

We should be permitted -- two other ways.

I don't know how government is going to prove its case, but typically they would prove what the grand jury was investigating, and they would try to establish a motive with respect to destroying documents, because there is an

investigation of foreign corrupt practices, and try to somehow suggest to the jury that this defendant wanted to impede the grand jury in its investigation so that he would not be charged or his partners would not be charged.

His belief that the document are inauthentic and the proof that they are inauthentic drives a truck through the motive, and we should be permitted to drive that truck.

THE COURT: Is it your contention that if Mr. Cilins doesn't know what a grand jury is that he can't be convicted?

MR. SCHWARTZ: It is my contention that if Mr. Cilins did not believe that he was impeding some kind of official investigation, if he did not believe there was an investigation, he certainly can't be convicted.

You can tell me there is a grand jury, and I can think you are a nut and take the documents and rip them up, and in fact there is a grand jury.

But if I can prove that I thought you were a nut and thought you were lying to me about a grand jury, I've destroyed evidence, but I haven't done it criminally.

That's what the Arthur Andersen case is about. Arthur Andersen was destroying evidence, and they were doing it knowing that it was potential evidence.

But the question the Supreme Court had is, if the jury isn't told that it was done corruptly, that they had to consider whether it was done corruptly, a decision exclusively

in their province. They can't take this away by what I call the criminal equivalent of a summary judgment motion.

They can't say there's no defense under any state of the facts. The prosecutor -- who I met just today and I apologize by not calling him by name -- talked about there's no basis in the evidence for this.

That is a summary judgment motion. They don't get to make that argument until our case begins. If at the time our case begins they have a valid argument that says they should not be allowed to present this defense, because they can't tie X to Y, that's what your Honor does every day in cases. You consider whether you are going allow evidence to come in.

We think that your Honor can decide today that this is a valid defense, that the state of mind defense is a valid defense, and an expert putting on testimony in that regard is a valid way to prove that.

But if your Honor doesn't, we are two and a half months and a couple of weeks premature for that decision. Right now we're in discovery trying to develop the defense.

I think under any standard of Rule 16 these documents and their authenticity are material to the development of that defense.

Finally, your Honor let's talk about the witness.

Credibility always an issue at a criminal trial. This is a witness who they call a cooperating witness, so I will

venture a guess that she has a typical Southern District cooperation agreement.

I don't know what the deal is. I don't know whether she's gotten immunity. I don't know whether she's gotten any other benefits.

But what I do know is that in that cooperation agreement there is a line that says that the government can rip up her agreement if she fails to tell the truth.

And I can bet my life that if there is any cross-examination of this witness, or if we suggest in opening statements that this witness has lied, the first thing the government will do -- if we suggest it in opening statement, they will do it on direct, if we suggest it on cross-examination they will do it on redirect -- they are going to offer that cooperation agreement to bolster her credibility with the jury.

They are going to vouch for her with the cooperation agreement saying, Do you know what this means?

And she's going to say it means I can't lie. If she's lied about something so critical as documents that are at the core of a foreign corrupt practices investigation, that is something we should be allowed to cross-examine on.

If she testifies at all as to the meaning of the documents -- you know, they have to show that the documents were relevant to the grand jury investigation. I don't know

how they are going to do that.

In the complaint, the FBI agent says I believe that these were the documents you wanted and that these were documents that showed bribery.

He's not going to be able to do that here. His state of mind as to what my client thought is absolutely irrelevant.

They are going to need to ask her, what were the documents that you thought he wanted?

These documents are at the core of the case. They can't hide them. They can't take them out of the courtroom. They can't get rid of counts or get rid of specifications in counts and then say we have protected them.

What's going on here? What do they know about them that we don't know?

We should be allowed to look at those documents and make a decision for ourselves as to whether they are authentic.

We should be allowed, if they are inauthentic, to use that evidence in creating our defense, and responding to their state-of-mind evidence and in cross-examining and impeaching their witness.

This is core stuff. This isn't stuff at the periphery. This isn't stuff about an affirmative defense that doesn't apply in this case. We agree it doesn't apply. This is stuff that goes to the most fundamental thing that they've got to prove, and we think is the hardest thing for them to

prove.

Can they prove there was a grand jury?

I think they probably can, although I don't know this that yet.

Can they proffer that the grand jury wanted these documents?

Maybe. I have to see what their interpretation of their subpoena is.

Can they prove that my client knew that, and believed it subjectively?

They've got proof that they will offer on that issue, but I don't think it gets there. And I've got proof that I think we're going to be able to offer to rebut it, and I think the jury will be with me, or at least I should be able to allow them to decide that question and make that argument to them.

This is fundamental stuff. This isn't a case where they just come in, prove there is a grand jury, prove somebody wanted to rip up document. That would destroy the Supreme Court's ruling in Arthur Andersen.

THE COURT: What happens if the documents turn out to be authentic?

Is the government going to be able to make the counterargument?

MR. SCHWARTZ: The government said in its motion, your Honor, that you should stop a mini trial and what mini trial

they propose it might be is the battle of the experts.

Your Honor may in your heart of hearts want to stop battles of the experts in every case, but you and I both know that battles of the experts are the real world in this courthouse.

We are talking about a battle of the experts that is going to take what? A day in total?

Our expert testifies in the morning that they are inauthentic, if in fact that is what his opinion turns out to be. Their expert testifies on rebuttal in the afternoon that they are authentic.

The jury, like it does in every other case, will decide which expert is more persuasive. If the jury decides that they are authentic and that he knew that they were authentic and that he knew that the grand jury wanted them and that he knew that they were called for and that he acted knowing that he was corrupting the grand jury process, they will convict him.

But if it finds a reasonable doubt on any of those things, they have to acquit him.

That's all that we want the chance to show here. And that's what this evidence goes to.

THE COURT: All right. I think I have your argument.

Mr. Spiegelhalter, do you want to be heard briefly?

MR. SPIEGELHALTER: Yes, your Honor. Thank you.

I think defense counsel stepped on the Court's question which is goes to the heart of the issue of whether forensic testing for authenticity is really relevant here; which is, if the reverse were true and say two experts say they are authentic, it's not going to underline Mr. Cilins' argument that he didn't know that at the time.

The government cited several opinions on this very issue, and after-the-fact expert opinion about whether something is or false can't be ingrafted back on what happened at the time.

This really goes to the entire argument about the forensic testing. I still, sitting here, can't conceive of why how this would help the defense prepare, if they are true or if they are false, if it doesn't generate evidence that's going to come in.

Mr. Cilins already knows all the players involved. I don't think there is any dispute about that. He's talked to them in the past. If he wants to testify about what they told him, then that is a bridge we have to cross at a later date.

But nothing that the expert would say or nothing that an expert would say could shed any light on what Mr. Cilins knew when he paid to have the documents burned.

So there's no reason to subject what in the government's view is an original set of documents that are aging at this point, to tests that can in some instances be

quite invasive.

There's just no reason to do that when they're relevant to a further inquiry and can be used later. There's no reason to do that here.

THE COURT: What do you mean when you say the documents are aging?

MR. SPIEGELHALTER: I mean, they are from 2006. They have been residing in Guinea for years.

When an expert goes and tests things like ink, there is nondestructive testing and then there is destructive testing.

Destructive testing involves boring holes into the documents in order to test the paper. That is not something we want to have done here, only to have it done later in another case, when it doesn't generate any evidence that would be relevant to the inquiry that this jury has to make.

So I think the government has covered its view at least, and I think the Court was going there with its question about whether these documents are actually circumstantial evidence of anything that Mr. Cilins could believed.

That's just simply not you the case.

I don't know if the Court wants me to address why the government would -- I think the government has already addressed why it would not want the documents tested, which is it has nothing do with its confidence in the cooperating

witness.

I think one other issue that arises with the defendant's argument in this regard is, even if there is all this testing, even if he wants on undermine the cooperating witness, he's not going to be allowed to do that with extrinsic evidence.

He can cross-examine her, but he would be struck with her answers to the questions that he poses. He couldn't have the witness on, call her a liar and then have an expert come in and say, yes, in fact she was lying.

That's not generally the way that it works. If they wanted to challenge her, they would have to challenge her through cross-examination, not through extrinsic proof later.

I think one thing that comes up repeatedly in the hypothetical, about the hypothetical, which is clearly the defense that's been laid out repeatedly, which is that she was shaken down repeatedly -- I'm sorry, that the cooperating witness had shaken down Mr. Cilins repeatedly.

But I think the key that I come back to is something that the Court highlighted. In the subpoena itself it calls for all documents.

It doesn't say all authentic documents, it doesn't say all originals, or all copies. It call for all of them, any and all of them.

It is obviously to be construed broadly. So the

proffered noncriminal motive, which is, I didn't want the grand jury to have them because they were fake, doesn't undermine as a matter of statutory interpretation or as of the case law doesn't undermine the criminal motive, which is that he didn't want the grand jury to have the opportunity to make that judgment for itself.

So, whatever else might have been going on in his mind, once he's told there is a subpoena, he can't continue.

Now, the question about whether he would believe the cooperating witness or not is something that is totally different.

Again, I think the government would just come back and point out that that can be proved extrinsically.

I think we will have this dispute later, so I don't want to -- I know that it's already getting late, but the standard of proof on whether these are specific intent or general intent crimes I think is a bridge we can cross when it comes to the jury instructions.

But I think one thing that's becoming sort of a repeated theme is ignorance of the law is Mr. Cilins defense: I didn't know what a grand jury was, I didn't know if they had the power to compel documents, I didn't know if they had the power to compel documents that were fraudulent.

That simply is not a defense. The government's view is actually these are general intent crimes, but we can cross

that bridge when we come to it.

I think other than that, unless the Court has additional questions.

THE COURT: All right. Thank you, Mr. Spiegelhalter.

MR. SPIEGELHALTER: Thank you.

MR. SCHWARTZ: Your Honor, I will be very brief, if I may.

First, as to the last point, the Supreme Court has said that the statute requires an intent to subvert fact finding.

So I think that is a full answer.

Second, with respect to the subpoena, once again, my client wasn't shown the subpoena. And, frankly, your Honor, if you read the subpoena, you might ask whether a document that is not related to the actual contract for the mines, whether a false document is covered by the subpoena.

I am not clear, and I have read the subpoena, that it calls for all documents relating to this project. If it is an inauthentic document, it doesn't related to this problem.

The fact that I write a little note and make something up doesn't make it relate to anything. So, he didn't see the subpoena, but had he seen the subpoena I think the defense might even be stronger than it is.

The government keeps saying that this is not proof of his state of mind, I guess because we haven't shown all the

circumstances that lead to that.

We are not required to yet. We don't have to lay out everything that we think is going to get to the point where when the jury hears that these are false documents, they are going to hear that that was the state of mind or that corroborated his state of mind.

We are just not required to do that at this stage, and we shouldn't be required to do that at this stage.

The government made a motion in which they essentially argued for summary judgment on grounds that we were asserting an affirmative defense which we are not asserting.

They didn't address in their motion the arguments that I am making today, and they didn't address in their reply brief the arguments that we made in our brief about their witness's credibility.

The issue of extrinsic evidence is not as simple as he has said it is. It depends in all kinds of different ways, what the witness says and how it comes in, what we are entitled to use to impeach her.

And certainly, if they put in her cooperation agreement, which I am certain they are going to do, we are entitled to show that she lied to the government. That much I know for sure.

I can't understand what it is about these documents that they are telling us you can't look at them. You can't

test them.

If they've got a reason at trial to keep them out, let's hear it at trial. Let us prepare for trial and prepare our defense; and, if we find out they are inauthentic, whether we can find a way to get them into evidence. If we find out that they are authentic, we will have to deal with that and structure our defense in a different way.

But we should be able to test these documents.

THE COURT: All right. Counsel, thank you for your arguments. Decision reserved on the motions.

Anything further at this time?

MR. KOBRE: Not from the government, your Honor, except that the government would request to exclude time under the Speedy Trial Act before we conclude the proceeding until trial date of December 2 from today until2.

MR. SCHWARTZ: We have no problem with that, your Honor.

THE COURT: All right. So the defendant consents to the exclusion of time between now and December 2?

MR. SCHWARTZ: One moment.

Your Honor, as I said, when I --

THE COURT: Has he made a decision?

MR. SCHWARTZ: Yes, he does.

THE COURT: He does.

MR. SCHWARTZ: When I made may appearance this

afternoon, your Honor, I said I'm the new guy on the block.

One of the things I am looking at is this December 2 trial date. There is an awful lot of material. I'm not asking that the Court push this far, but I was wondering if we could push this trial into next year, particularly if the Court orders that we are permitted to do this additional discovery.

I would appreciate it very much. My client has consented to that. Sometime in January or February, if the Court could see fit to do that, I would appreciate it.

THE COURT: I am open to that. Do you want to fix adjourned date now?

MR. SCHWARTZ: We don't necessarily have to, your Honor. Can I confer with cocounsel and my client?

THE COURT: Yes.

MR. SCHWARTZ: Your Honor, I think it might be a better thing to do after your Honor rules on this motion, because then we will have a better sense of what awaits us in terms of preparation.

THE COURT: All right. Let me just suggest in the meantime that the parties try to keep their calendars clear starting on February 3 because I have a lot of trials between now and the middle of January.

MR. SCHWARTZ: I will look forward to spending my birthday with the Court.

THE COURT: There is no better place, Mr. Schwartz.

All right.

Anything else?

So for now do I have a consent?

I am going to exclude time until December 2 at this juncture?

MR. SCHWARTZ: Yes, your Honor, you have our consent.

THE COURT: All right. I find that this continuance serves to insure the effective assistance of counsel, especially with new counsel in the case and the motions pending before the court, so I prospectively exclude the time from today until December 2 from Speedy Trial Act calculations.

I find that this continuance serves to ensure the effective assistance of counsel and prevent any miscarriage of justice.

Additionally, I find that the ends of justice served by such a continuance outweigh the best interests of the public and Mr. Cilins in a speedy trial pursuant to 18 U.S.C. Section 3161.

Anything else?

MR. SPIEGELHALTER: Not from the government, your Honor.

THE COURT: Anything else, Mr. Schwartz or Mr. Lehr?

MR. SCHWARTZ: Nothing at this time, your Honor.

THE COURT: All right.

Have a good evening and an easy fast.

MR. SCHWARTZ: Thank you, your Honor.

MR. KOBRE: Thank you.

(Adjourned)